

A Pelangi Airways Sdn Bhd v Mayban Trustees Bhd

HIGH COURT (KUALA TRENGGANU) — ORIGINATING SUMMONS NO
24-59 OF 2000
ABDULL HAMID EMBONG J
30 JANUARY 2001

B *Civil Procedure* — Parties — Intervention — Interested party not a party to the suit — Whether prior leave of court is a pre-condition to amending the intitulement of summons — Principle

C *Civil Procedure* — Restraining order — Setting aside — Order obtained to provide immunity from further proceedings for one year — Whether application for order made proper — Companies Act 1965, s 176(10A)

D Mayban Trustees Bhd ('Mayban Trustees') applied for leave to intervene in this proceeding and consequently be named a party and to amend the intitulement of this summons. Mayban Trustees also sought for the restraining order of this court, granting Pelangi Airways ('Pelangi') a one year period of immunity from further proceedings in any action, to be set aside on grounds that certain provisions of s 176(10A) and (10C) of the Companies Act 1965 ('the Act') had not been complied with when the application for the restraining order was made; and that although the restraining order was obtained on 3 July 2000, Pelangi made no attempt to notify the receiver of it until 22 August 2000 and was reluctant to notify Mayban Trustees who represented a large portion of Pelangi's creditors. Pelangi in turn raised a preliminary objection that Mayban Trustees' aforementioned application was defective since its intitulement had included Mayban Trustees as a party without prior leave of the court being granted.

F **Held**, allowing the application to intervene and setting aside the restraining order with cost:

G (1) Mayban Trustees is not yet a party, but as the description ('pencelah yang dicadangkan') suggests, only described as a proposed party at this stage. The joinder of a necessary party as Mayban Trustees were here, is governed by O 15 r 6 of the Rules of the High Court 1980 which does not mandatorily require leave of the court to be first obtained as a pre-condition to amending the intitulement of the summons. Furthermore, the adding in of Mayban Trustees' name to this summons did not in any way prejudice Pelangi. As such, the preliminary objection was dismissed (see p 241B-E).

H (2) Applying the test laid down by the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, which is: will the intervenor's right against or liabilities to any party to an action be directly affected by any order made in the action? The court is satisfied that Mayban Trustees, as trustee to the bondholders and thus representing a portion of Pelangi's creditors, had fully

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satisfied that test. In that event, its prayer to be enjoined as an intervenor was allowed (see pp 241I–242A).

- (3) One of the mandatory requirements provided in s 176(10A) of the Act before a restraining order may be granted is for an applicant company to furnish a statement in the prescribed form as to its affairs. The court will only allow a restraining order for a period beyond the principal 90 days only for a ‘good reason’. The qualifying words ‘if and only if’ in s 176(10A) of the Act means that the applicant must without fail, comply with the conditions set out in sub-s (10A), one of which is for furnishing of its statement of affairs. This is an absolute necessity in order that the court may discern a ‘good reason’ for extending the 90-day restraining period to say, as in this case, one year. Pelangi failed to comply with this requirement (see pp 242I, 243B–C).
- (4) Under s 176(10A)(d) of the Act, it is for the court to approve the person nominated by the majority of the creditors to act as a director. Where a person is nominated, no restraining order may be granted if the court does not approve or appoint him to act as a director. So, if for whatever reason, no person is nominated by the creditors, there can be no one to approve or appoint, no one then is approved or appointed, and no restraining order may be granted (see pp 243I, 244A–B); *Re Sanda Industries Bhd & Ors* [1999] 1 AMR 892 followed.

[Bahasa Malaysia summary]

Mayban Trustees Bhd (‘Mayban Trustees’) telah memohon kebenaran untuk mencelah di dalam prosiding ini dan berikutnya telah dinamakan sebagai satu pihak dan untuk meminda tajuk saman ini. Mayban Trustees juga memohon satu perintah sekatan daripada mahkamah ini, membenarkan Pelangi Airways (‘Pelangi’) tempoh satu tahun imuniti daripada prosiding selanjutnya dalam apa-apa tindakan, diketepikan atas alasan bahawa peruntukan tertentu s 176(10A) dan (10C) Akta Syarikat 1965 (‘Akta tersebut’) tidak dipenuhi semasa permohonan untuk perintah sekatan tersebut dibuat; dan bahawa walaupun perintah sekatan tersebut diperolehi pada 3 Julai 2000, Pelangi tidak membuat apa-apa usaha untuk memaklumkan penerimanya sehingg 22Ogos 2000 dan telah enggan untuk memaklumkan Mayban Trustees yang mewakili sebahagian daripada pemberi kredit Pelangi. Pelangi sebaliknya telah menimbulkan satu bantahan awal bahwa permohonan Mayban Trustees yang dinyatakan di atas adalah defektif memandangkan tajuknya telah memasukkan Mayban Trustees sebagai satu pihak tanpa terlebih dahulu mendapat kebenaran mahkamah.

Diputuskan, membenarkan permohonan untuk mencelah dan mengeneipkan perintah sekatan tersebut dengan kos:

- A (1) Mayban Trustees masih bukan satu pihak, tetapi sebagai yang digambarkan ‘pencelah yang dicadangkan’, hanya menggambarkan sebagai satu pihak yang dicadangkan di peringkat ini. Percantuman satu pihak yang perlu sepertimana Mayban Trustees adalah di sini, dikawal oleh A 15 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 yang tidak secara mandatori memerlukan kebenaran mahkamah terlebih dahulu sebagai satu pra-syarat di dalam meminda tajuk saman tersebut. Tambahan pula, dalam menambahkan nama Mayban Trustees di dalam saman tersebut tidak langsung memprejudiskan Pelangi. Oleh demikian, bantahan awal tersebut ditolak (lihat ms 241B–E).
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- C (2) Dengan menggunakan ujian yang dipakai oleh Privy Council dalam *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, di mana: adakah hak pencelah terhadap atau liabiliti kepada mana-mana pihak di dalam suatu tindakan mempunyai akibat langsung daripada apa-apa perintah yang dibuat di dalam tindakan tersebut? Mahkamah berpuas hati bahawa Mayban Trustees, sebagai pemegang amanah kepada pemegang-pemegang bon dan seterusnya mewakili sebahagian daripada pemberi kredit Pelangi, telah dengan sepenuhnya memenuhi ujian tersebut. Di dalam keadaan demikian, permohonannya untuk dicantumkan sebagai pencelah dibenarkan (lihat ms 241I–242A).
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- E (3) Salah satu daripada keperluan mandatori untuk diperuntukkan dalam s 176(10A) Akta tersebut sebelum satu perintah sekatan boleh diberikan adalah untuk pemohon syarikat mengemukakan satu penyata di dalam bentuk yang ditentukan berhubungburusannya. Mahkamah akan hanya membenarkan satu perintah sekatan bagi tempoh melebihi 90 hari sekiranya terdapat ‘sebab yang baik’. Perkataan yang layak ‘jika dan hanya jika’ dalam s 176(10A) Akta tersebut bermaksud bahawa pemohon mestilah tanpa gagal, memenuhi syarat-syarat yang dinyatakan dalam sub-s (10A), salah satu daripadanya adalah untuk mengemukakan penyata urusannya. Ini merupakan keperluan mutlak bagi membolehkan mahkamah menanggapi satu ‘sebab yang baik’ untuk melanjutkan tempoh sekatan 90 hari bagi menyatakan, di dalam kes ini, satu tahun. Pelangi telah gagal untuk memenuhi keperluan ini (lihat ms 242I, 243B–C).
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- H (4) Di bawah s 176(10A)(d) Akta tersebut, adalah untuk mahkamah meluluskan orang yang dilantik oleh majoriti pemberi kredit untuk bertindak sebagai pengatah. Apabila seseorang itu dilantik, tiada perintah sekatan boleh diberikan jika mahkamah tidak meluluskan atau melantik beliau untuk bertindak sebagai pengarah. Jadi, jika untuk apa sebab sekalipun, tiada siapa dilantik oleh pemberi kredit, tiada siapa yang boleh melulus atau melantik, tiada siapalah yang dilulus atau dilantik, dan tiada perintah sekatan patut diberikan (lihat ms 243I, 244A–B); *Re Sanda Industries Bhd & Ors* [1999] 1 MLJ 695 diikuti.]
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Notes

For cases on intervention of parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3278–3295.

For cases on restraining order generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4045–4046.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Farjis [1991] 1 MLJ 27 (refd)

Ng Hee Thoong v Public Bank [1995] 1 MLJ 281 (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (folld)

Sanda Industries Bhd & Ors, Re [1999] 1 MLJ 695 (folld)

Legislation referred to

Companies Act 1965 s 176(10), (10A), (10A)(c), (10A)(d)

Rules of the High Court 1980 O 15 r 6

Rules of Supreme Court 1957 O 16 r 11

Ahmad Zolkifli Ahmad Tabrani (Zulkiflee bin Zainuddin with him) (Amir Yusoff & Zol) for the applicant.

SM Yoong (Jeremy Tan) (Shook Lin & Bok) for the intended intervener.

Abdull Hamid Embong J. : Enclosure 9 is an application by Mayban Trustees Bhd ('Mayban Trustees') seeking leave to intervene in this proceedings and consequently be named a party and to amend the intitulement of this summons. The intended intervenor also sought the order of this court dated 3 July 2000 be set aside. The relevant original prayers are worded as such:

- (a) bahawa kebenaran hendaklah diberikan kepada pencelah yang dicadangkan untuk mencelah dalam prosiding ini;
- (b) bahawa pencelah yang dicadangkan tersebut hendaklah dijadikan satu pihak kepada prosiding-prosiding ini dan tajuk tindakan ini dipinda bagi memasukkan pencelah yang dicadangkan sebagai responden;
- (c) bahawa perintah yang dibuat oleh mahkamah ini pada 3 Julai 2000 hendaklah diketepikan;

On 3 July 2000, the applicant, Pelangi Airways Sdn Bhd ('Pelangi') by way of an ex parte chambers application obtained a restraining order under s 176(10) Companies Act 1965 ('the Act') wherein Pelangi was granted a one year period of immunity from further proceedings in any action.

At the outset, counsel for Pelangi raised a preliminary objection on the issue that this application (encl 9) was defective since its intitulement had included Mayban Trustees as a party without prior leave of the court being granted. Learned counsel cited *Arab Malaysian Merchant Bank Bhd v*

- A *Jamaludin bin Dato Mohd Farjis* [1991] 1 MLJ 27, where the respondent, in attempting to set aside a judgment in default entered against the judgment debtors had gone through the motion of seeking leave from the court to be made a party, and such leave was accordingly granted by the senior assistant registrar ('SAR') and confirmed, on appeal, by the judge in chambers. That case however, is no authority for the proposition put forward by Pelangi's
- B counsel that an intervenor need to obtain the court's leave before the intitulement of this summons can be changed to include the intervenor as a party. Firstly, the intended intervenor here is not a party yet but, as the description 'pencelah yang dicadangkan' suggests, only described as a proposed party at this stage. Secondly, the joinder of a necessary party as
- C Mayban Trustees are here, is governed by O 15 r 6 Rules of the High Court 1980 ('the RHC') which does not mandatorily require leave of the court to be first obtained as a pre-condition to amending the intitulement of the summons. Furthermore, the adding in of Mayban Trustees' name to this summons did not in any way prejudice Pelangi. On the other hand to hold that such a defect is fatal would, in my view, be most unjust to the applicant
- D here because, as was held in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, one of the principal objects of the former O 16 r 11 of the Rules of Supreme Court (now O 15 r 6 RHC) is to enable the court to prevent injustice being done to a person whose rights would be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. As such, the
- E preliminary objection was dismissed.

- Having disposed of the preliminary objection, the court went on to consider the merit of the intended intervenor's application to be added as a party. The only objection raised by the learned counsel for Pelangi was that Mayban Trustees acted as a trustee and that it was not a creditor, or had
- F received any instruction or obtained any mandate from any of Pelangi's creditors to apply to be a party in this proceedings. In my view, this argument does not hold water. As trustee for the bondholders, Mayban Trustees is clearly a person affected by the earlier restraining order and should be given an opportunity to be heard. Order 15 r 6 of the RHC provides for the scope in which this Court may exercise its discretion to
- G allow a party to be joined in. It states:

- (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—
- (a) ...
- H (b) order any of the following persons to be added as party, namely—
- (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
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Applying the test laid down by the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, as accepted over here (see eg the

Supreme Court decision in *Jamaludin's* case [1991] 2 MLJ 27) which is: will the intervenor's rights against or liabilities to any party to an action be directly affected by any order made in the action? I am satisfied that Mayban Trustees, as trustee to the bondholders, and thus representing a portion of Pelangi's creditors, had fully satisfied that test. In that event its prayer to be enjoined as an intervenor was allowed.

Now, to the brief background facts. On 11 October 1991, a trust deed was executed between Pelangi appointing Mayban Trustees pursuant to a decision by Pelangi to issue RM40m secured bearer bonds which were subscribed to by five participating banks (bondholders). The said bonds were secured by two deeds of mortgage executed by Pelangi in favour of Mayban Trustees, over two Fokker 50 aircrafts. Pelangi defaulted in its payment of interest to the bondholders, and Mayban Trustees, pursuant to its obligation as trustee to the bondholders under the trust deed, commenced legal proceedings against Pelangi in Kuala Lumpur vide suit No D4-22-165-199, and on 5 August 1999 obtained summary judgment against Pelangi in the sum of RM48,822,424.82 on the principal debt and accrued interests. On 17 June 1998, Mayban Trustees appointed a receiver over the aircrafts. On 22 August 2000, the receiver received a notice of the ex parte restraining order dated 3 July 2000 obtained by Pelangi.

Before me, the restraining order obtained on 3 July 2000 was challenged as to its validity based on two main grounds viz:

- (i) that certain provisions of ss 176(10A) and (10C) of the Act had not been complied with when the application for the restraining order was made; and
- (ii) that although the restraining order was obtained on 3 July 2000, Pelangi made no attempt to notify the receiver of it until 22 August 2000 and was reluctant to notify Mayban Trustees who represented a large portion of Pelangi's creditors. Mayban Trustees also complained that Pelangi had, to date, made no attempt to meet with it and the other bondholders to present its alleged proposed restructuring scheme and questioned the bona fides of the restraining order. Also, in the meantime, the receiver had advised Mayban Trustees that the aircrafts continue to deteriorate and depreciate in value. There is also an offer to purchase the aircrafts for US\$5.5m by one Kaufman Shays Sdn Bhd which cannot materialize due to the restraining order. Meanwhile, Pelangi admitted to making RM2 to RM3m per month for the use of the aircrafts but had not, save for a one-off US\$200,000 payment, paid anything to Mayban Trustees.

The statutory requirements under s 176(10A) of the Act

One of the mandatory requirements, before a restraining order may be granted is for an applicant company to furnish a statement in the prescribed form as to its affairs. This is provided for under sub-s (10A)(c) of the Act which states:

A (10A)The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may for good reason allow if and only if—

...

B (c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and (Emphasis added.)

...

C Firstly, it can be immediately noticed from the phrase underscored above that the court will only allow a restraining order for a period beyond the principal 90 days only for a 'good reason'. The qualifying words 'if and only if' means that the applicant must, without fail, comply with the conditions set out in the sub-paragraphs to s 176(10A) of the Act, one of which is for the furnishing of its statement of affairs under sub-para (c) of s 176(10A) of the Act. This, in my view, is an absolute necessity in order that the court may discern a 'good reason' for extending the 90 day restraining period to say, as in this case, one year. In the instant case, there was no dispute that

D the statement of Pelangi's affairs in the prescribed form was not lodged together with its application. In considering this objection by Mayban Trustees, I had perused Pelangi's application in encl 1 (the ex parte originating summons) and its affidavit in support and could not find the required statement of affairs accompanying the application. Learned

E counsel for Pelangi also could not show to the court, when asked, what the 'prescribed form' in which the statement was to be furnished was. As such, this Court is in full agreement with the learned counsel for Mayban Trustees, that Pelangi had failed to comply with one of the mandatory requirements under s 176(10A) of the Act.

F The second objection taken up by Mayban Trustees is the failure to comply with the requirement provided under sub-para (d) of s 176(10A) the Act which states:

G (d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum or articles of the company, appoints the person to act as a director.

H The faint reply from the learned counsel for Pelangi on this issue was that he had submitted to the learned judge on presenting the application, that the creditors may not have a common consensus in appointing a director. The law is trite on the need to specifically reply to an allegation, otherwise that allegation not replied to must be taken to have been accepted (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382). It is also settled law that any matter that is raised by an appearing counsel from the bar table may be ignored by the court (see eg *Ng Hee Thoong v Public Bank* [1995] 1 MLJ 281). But more importantly, the explanation by learned

I counsel is, in my view, implausible. Under sub-para (d) of s 176(10A) of the Act, it is for the court to approve the person nominated by the majority of the creditors to act as a director.

On this issue, the court also found favour with the stand taken by Mayban Trustees' counsel. In *Re Sanda Industries Bhd & Ors* [1999] 1 MLJ 695, where no person had been nominated pursuant to sub-para (d) of s 176(10A) of the Act, it was held by Abdul Aziz bin Mohamad J that 'even where a person is nominated, no restraining order may be granted if the court does not approve or appoint him to act as a director. So if for whatever reason, no person is nominated by the creditors, there can be no one to approve or appoint, no one then is approved or appointed, and no restraining order may be granted.' I fully subscribe to the learned judge's construction of sub-para (d) of s 176(10A) of the Act.

Having heard the respective submissions on both the statutory grounds of non-compliance by Pelangi in its application to obtain the restraining order, I had asked the learned counsel for Mayban Trustees to go no further. I was satisfied that Pelangi had failed to furnish to the court with the required information under both the sub-paragraphs, and had to conclude that Pelangi's initial application, and thus the restraining order, had been irregular. The restraining order is thus set aside with costs of this application given to Mayban Trustees.

Application to intervene allowed and restraining order set aside with costs.

Reported by Wong Ee Lynn

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